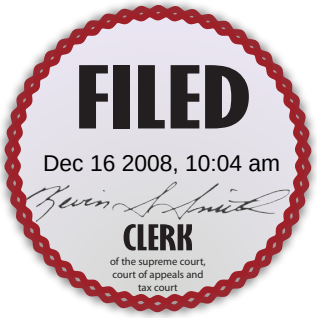

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IN THE
COURT OF APPEALS OF INDIANA

ELMER D. CHARLES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0806-CR-314
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SAINT JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0111-CR-470

December 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Elmer D. Charles appeals the sentence he received following his conviction of Rape,[1] a class A felony, and the finding that he was a Repeat Sexual Offender,[2] which were entered upon his guilty plea.

We affirm.

Charles admitted at the guilty plea hearing that on October 19, 2001, he was released from Oaklawn Hospital in Goshen and taken by taxi-cab to Madison Center Hospital in South Bend, Indiana. Along the way, he commandeered the cab, raped its driver, sixty-year-old L.B., and robbed her. As a result of the incident, Charles was charged with rape as a class A felony, robbery as a class C felony, criminal confinement as a class D felony, and was alleged to be a repeat sexual offender. Charles and the State eventually entered into a plea agreement whereby Charles agreed to plead guilty to rape and admit to being a repeat sexual offender, in exchange for the State's agreement to dismiss the remaining charges. The parties agreed that Charles would be sentenced to a minimum of thirty years, but sentencing would otherwise be left to the court's discretion.

At the November 13, 2003 sentencing hearing, the court stated the following with regard to Charles's sentence:

> Having judicially noted the defendant's criminal history and further judicially noting the psychological assessments previously submitted in this case, the Court finds the defendant not through his own fault but undeniably has a proclivity to sexual criminal activity against others. The Court judicially notes the circumstances under which this offense was committed were a matter of aggravation.
>
> The Court accepts that the defendant expresses remorse and intention to

1 Ind. Code Ann. § 35-42-4-1 (West, PREMISE through 2008 2nd Regular Sess.).
2 Ind. Code Ann. § 35-50-2-14 (West, PREMISE through 2008 2nd Regular Sess.).

> utilize all available counseling and treatment programs. But the Court finds aggravation outweighs the mitigation and that society needs a maximum of protection in this case.

Appellant's Appendix at 34. Based upon the foregoing statement, the trial court imposed the maximum fifty years for the class A felony conviction, enhanced by the maximum ten year term permitted under I.C. § 35-50-2-14 for the repeat sexual offender determination, for a total executed sentence of sixty years.

Charles first contends the trial court's sentencing statement was inadequate. Our Supreme Court has determined that the trial court must enter a sentencing statement when imposing a felony sentence and "the [sentencing] statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Moreover, if it includes a finding of aggravating or mitigating circumstances, the statement "must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id*. In conducting our review, we may glean the trial court's intentions from either the written sentencing statement, the court's comments during the sentencing hearing, or both. *See Corbett v. State*, 764 N.E.2d 622, 631 (Ind. 2002) ("we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings"). The sentencing statement will be considered adequate if it provides a sufficient basis for appellate review of the sentence. *See Anglemyer v. State*, 868 N.E.2d 482.

In this case, as will be discussed more fully below, the trial court's comments reflect that it found as aggravators the nature and circumstances of the crime, Charles's criminal history, and the risk that he will re-offend. As mitigators, the trial court found that Charles expressed remorse for his actions and expressed an intention to seek treatment. The court deemed the aggravators of greater weight and thus imposed the maximum sentence. Although perhaps marginally so, the sentencing statement was sufficient to permit this court to conduct a meaningful review. Accordingly, the trial court did not abuse its discretion by failing to enter a sentencing statement.

Charles contends the trial court abused its discretion in identifying aggravating and mitigating factors, "failing to give proper consideration to the mitigating factors," and imposing an inappropriate sentence. *Appellant's Brief* at 3. We begin with the claim involving the failure to give proper consideration to the mitigating circumstances. We interpret this as a claim that the trial court assigned those factors too little weight. In *Anglemyer v. State*, 868 N.E.2d at 491 (Ind. 2007), our Supreme Court held that a claim of mis-weighing aggravating and mitigating circumstances is no longer available on appeal ("[b]ecause the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence … a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors"). Therefore, we will not consider this claim with respect to the weighing of factors identified by the court.

Charles claims the trial court erred in identifying aggravating factors.[3] Charles characterized the aggravators found by the court as "vague and open to interpretation." *Appellant's Brief* at 6. Although we agree that the trial court's explanation of its aggravators (and mitigators, for that matter) was not detailed, it is clear that the court identified three: Charles's criminal history, the nature and circumstances of the crime, and the risk that he will re-offend. We will discuss each in turn.

We note that the trial court may properly consider the nature and circumstances of the crime as an aggravating circumstance. *See Ousley v. State*, 807 N.E.2d 758 (Ind. Ct. App. 2004). Charles correctly observes that the trial court did not explain what it meant in finding that the circumstances of Charles's offense were a matter of aggravation. We note, however, that the victim was sixty years old, while Charles was only twenty-three. Also, claiming to be armed with a deadly weapon during the entire episode, Charles repeatedly terrorized her during and after the rape by telling her that he was going to kill her. In fact, Charles was taking the victim into a secluded ravine when the episode ended only because Charles was scared by the sound of a police car and fled from the scene. The nature and circumstances of the offense was a valid aggravating circumstance.

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[3] We address in passing Charles's claims relative to what he describes as the "troubling … diatribe", *Appellant's Brief* at 15, delivered by the court at sentencing on the subject of the possibility that the Indiana General Assembly will "let everybody out they can." *Appellant's Appendix* at 132. Charles speculates that the court was thereby articulating its frustration with Indiana's sentencing scheme, and further speculates that such frustration impermissibly swayed the court away from imposing the minimum sentence. The former observation is really not speculation at all, as the trial court admitted its comments reflected "a little note of frustration." *Id*. at 133. But, we are satisfied that the latter speculation is unfounded. Unlike Charles, we take the court at its word when, admitting its "general note of frustration", it nonetheless assured, "I am not using it on this defendant." *Id*.

The court also found Charles's criminal history to be aggravating. By statute, this is recognized as a valid aggravator. *See* Ind. Code Ann. § 35-38-1-7.1(a)(2) (West, PREMISE through 2008 2nd Regular Sess.). When he was twelve years old, Charles was adjudicated a delinquent child for committing acts that would constitute the crimes of criminal recklessness, burglary, theft, and criminal mischief if committed by an adult. He was later convicted as an adult of sexual battery as a class D felony. Charles also had been convicted of possession of a handgun as a class C felony, criminal mischief as a class B misdemeanor, and he had a pending burglary charge at the time he was sentenced. Although this history of criminal activity is not particularly extensive, Charles's previous felony conviction for a sexual offense takes on heightened significance in light of the current rape offense, and the trial court did not err in considering it as an aggravator.

Clearly, however, the most compelling aggravator was the risk that Charles would re-offend. The court noted Charles's tragic childhood, in which Charles suffered emotional abuse, physical abuse from his father, and sexual abuse at the hands of his father and mother, as well as an uncle. No doubt at least partially as a result of the sustained abuse over a period of years, Charles suffers from "some mental disorders." *Appellant's Appendix* at 108. According to one psychologist, Charles meets the criteria for "having a major psychiatric disorder." *Id*. at 110. He also experiences audio and visual hallucinations "almost every day." *Id*. at 107. He admitted to regularly engaging in bizarre sexual behavior, including cutting himself and his partners during sex, dropping hot wax on his genitals, and placing metal clips and needles in his testicles. He has a history of substance abuse, most notably

involving alcohol and cocaine, but also including heroin, PCP, Ecstasy, LSD, and marijuana. In the summary section of a forensic psychiatric evaluation prepared for sentencing in the instant case, the preparer concluded, "At this point, rehabilitation in society would be very difficult, and long-term treatment in a facility that could provide a containment of his behavior, as well as treatment for his multiple sexually deviant behaviors is strongly recommended." *Id*. at 102. The level of threat Charles presents to society is clearly illustrated in the instant case, in which Charles raped the cab driver who was transporting him from one mental health facility to another. All of these facts support the following assessment by the trial court regarding the danger Charles represents to society:

> But it seems to me I have to take into account that Mr. Charles has exhibited just very great problems in self[-]regulatory patterns. He doesn't have much self-regulatory patterns here. And he has impulsiveness which is very psychosexual, and that makes him – I mean ironically it's not his fault. He was terribly treated, and that's terrible. But the result of it is it makes him as an adult very dangerous sexually.

Transcript at 17. This "danger" includes primarily the risk that Charles will re-offend. The trial court did not abuse its discretion in finding the risk of re-offending as an aggravating circumstance.

We turn now to a consideration of the mitigating factor that Charles alleges was proffered but not found. The trial court did not cite Charles's guilty plea as a mitigating factor, but Charles contends it is a valid mitigator. We agree. In fact, our Supreme Court has stated that trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004). A guilty plea, however, is not inherently considered a *significant* mitigating circumstance. *Francis v. State*,

817 N.E.2d 235. For instance, a guilty plea's significance is diminished if there was substantial admissible evidence of the defendant's guilt. *See Scott v. State*, 840 N.E.2d 376 (Ind. Ct. App. 2006), *trans. denied*. Although the guilty plea obviated the need to present evidence at trial, including the victim's unequivocal eyewitness testimony, the State's evidence of guilt in this case was substantial. Moreover, in exchange for Charles's guilty plea, the State dismissed charges of robbery and criminal confinement, both as felonies. Because he received a substantial benefit for his guilty plea, it is not entitled to significant mitigating weight. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) ("a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one"), *trans. denied*. The trial court did not commit reversible error with respect to the finding of mitigating circumstances.

Charles contends his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d at 381. Charles bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

Beginning with the nature of this offense, the disturbing circumstances of the crime

are that the victim in this case was sixty years old - almost three times Charles's age. Moreover, there is no reason to believe that Charles's threat to kill the victim after raping and robbing her was an idle one. He was marching her to a secluded spot when the serendipitous sound of a siren intervened to sidetrack Charles and possibly save the victim's life.

With respect to Charles's character, we note that he pleaded guilty to this offense, which is a valid mitigating factor. As noted above, however, a guilty plea is not necessarily a significant mitigating factor. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). In this particular case, Charles received a significant benefit in exchange for his plea and the evidence against him was strong. Under these circumstances, we cannot say the guilty plea speaks highly of Charles's character. Also, the trial court discounted the mitigating weight of Charles's expressions of remorse and his stated intention to seek treatment for his deviant sexual behavior. We are not inclined to second-guess that determination, as the trial court's vantage point is superior to ours in making that assessment. Finally, we note that the trial court mentioned Charles's difficult childhood, and opined that Charles's sexual deviancy might well trace its roots to that tragic experience. That may very well be the case, but the trial court nevertheless obviously assigned it low mitigating weight. So do we. This assessment finds support in our case law. Our Supreme Court has "consistently held that evidence of a difficult childhood warrants little, if any mitigating weight." *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000), *cert. denied*, 534 U.S. 1057 (2001). At best, the mitigating weight is in the low range. *See Peterson v. State*, 674 N.E.2d 528 (Ind. 1996), *cert. denied*, 522 U.S. 1078 (1998).

Although Charles's criminal history was not extensive, it did include a sexual offense. In light of the instant offense, that otherwise unremarkable criminal history is thereby rendered one that is entitled to some aggravating weight. Finally, we come to the most serious of the aggravating circumstances, i.e., the risk that Charles will re-offend. As noted by the trial court and detailed above, Charles's aberrant sexual proclivities include unusual sexual appetites that psychological evaluators classified as deviant, and which Charles seems unable or unwilling to control. This, in combination with other emotional-functioning factors (e.g., bipolar disorder, auditory and visual hallucinations, and post-traumatic stress disorder) and habitual substance abuse, indicates that Charles constitutes a great threat to society while unconfined. Clearly, he poses a significant risk of re-offending.

After reviewing Charles's character and the nature of the offense of which he was convicted, we cannot say the sixty-year sentence imposed by the trial court is unreasonable.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur